

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD H. MCCULLOUGH AND
HOLLY A. MCCULLOUGH,

Plaintiffs,

v.

ADVEST, INC., MERRILL LYNCH, PIERCE
FENNER & SMITH INCORPORATED,
BANK OF AMERICA, N.A. (as successor in
interest to Merrill Lynch Pierce, Fenner &
Smith Incorporated and Advest Incorporated),
ROBERT FELDMAN,

Defendants.

ELECTRONICALLY FILED

Civil Action No. 17-407

Judge Cathy Bissoon

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Advest, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Bank of America, N.A., and Robert Feldman, by and through counsel, move to dismiss Plaintiffs' Amended Complaint for the reasons stated below and in the accompanying memorandum.

1. *More than a decade ago*, Plaintiffs Richard and Holly McCullough began purchasing high-risk "penny stocks," apparently hoping to make sizable profits for themselves.¹ Through their broker dealer, Oppenheimer & Co., Plaintiffs purchased shares of Telkonet, Inc. ("TKOI") and Geo Global Resources, Inc. ("GGR") (Exhibit 1 to Amended Complaint). However, Plaintiffs' speculative investments with Oppenheimer did not pan out as they hoped.

¹ A "penny stock" is generally defined as a security of a low capitalized company that trades for less than \$4 per share. See SEC Rule 3a51-1. 17 C.F.R. § 240.3a51-1.

2. The revised allegations asserted in Plaintiffs' Amended Complaint, filed after Defendants had previously moved for dismissal, make clear that Plaintiffs' claims are too late; the statute of limitations for each of them expired long ago. As the Amended Complaint establishes, all alleged "discussions" with Defendant Feldman (assuming solely for purposes of this motion that the discussions in fact occurred) and the securities purchases that were allegedly induced through them occurred *ten or more years ago* in 2007 or earlier. The Amended Complaint also makes clear that Plaintiffs did not exercise any diligence (reasonable or otherwise) with respect to Mr. Feldman's putative representations, none of which was false anyway, nor did they take action for years after any reasonable investor would have known the facts of a potential claim as a matter of law. As a result, Plaintiffs' claims are time-barred under their respective statutes of limitations.

3. At the time of the purchases in the Amended Complaint, Plaintiffs were customers of Oppenheimer (who they have not sued) and not of *any* of the Defendants. Plaintiffs now allege that on each of the days they purchased shares of TKOI and GGR (all of which occurred between March 17, 2005 to December 31, 2007), they had a telephone conversation with Defendant Robert Feldman about those companies and, because of that, Mr. Feldman and the other Defendants are liable for Plaintiffs' losses. (Am. Compl., ¶¶ 10, 15-23, Exhibit 1 to Amended Complaint) Plaintiffs fail to plead that they ever became clients of Mr. Feldman or any of the corporate defendants² (they did not). The law recognizes no legal claim under these facts.

² Through acquisitions dating back to 2005, Advest was acquired by Merrill Lynch, which, in turn, was purchased by Bank of America in 2009. As a result, it is critical that Plaintiffs plead with whom they held accounts at the time of each alleged purchase, which they have failed to do.

WHEREFORE, Defendants request that the Court dismiss Plaintiffs' Amended Complaint.

Dated: May 15, 2017

MORGAN, LEWIS & BOCKIUS LLP

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Smith Incorporated, Bank of America, N.A.,
and Robert Feldman*

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2017, a true and correct copy of the foregoing
DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT was filed with the
Clerk of the Court using the CM/ECF system upon the following:

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